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IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1988

THE AMERICAN BOARD OF ENDODONTICS and
THE AMERICAN ASSOCIATION OF ENDONTISTS,

Petitioners,

vs.

JOAN ELENA LANIER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL L. PITT
KELMAN, LORIA, DOWNING,
SCHNEIDER & SIMPSON
2300 First National Building
Detroit, Michigan 48226
(313) 961-7363
Attorney for Respondent

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The Respondent, Joan Elena Lanier, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Sixth Circuit's Opinion in this case.

STATEMENT OF FACTS

Respondent brought this action under Michigan's Civil Rights law known as the Elliott-Larsen Civil Rights Act MCLA 37.2101 et seq; MSA 3.548(101) et seq, claiming she has been denied board certification by the American Board of Endodontics and that her sex and race were significant factors in the decision. As respondent's complaint indicates, there are approximately 2,800 endodontists world-wide. Only 34 of these endodontists are women. Of the male endodontists, about 23% are board certified. Only 6%, or two women, are board certified. (Complaint, ¶13).

Respondent became suspicious that sex was a significant factor when, after successfully completing the written and case history portion of the examination process, she was denied on two occasions certification solely because of her alleged unsuccessful oral examination.

(Ct. App. Appendix p. 111-114).

Respondent's suspicion became a firm belief when she received a letter from an employee of the American Board of Endodontics. This employee stated that "endodontics will be a male dominated profession for some time to come". (Ct. App. Appendix p. 115).

On November 2, 1984, the initial action against the American Board of Endodontics was removed to Federal District Court, Eastern District of Michigan. On November 27, 1984, a second action naming the parent organization, American Association of Endodontist (AAE) was filed in Federal District Court. On January 4, 1985, the two actions were consolidated.

The Petitioners filed motions to dismiss the complaint. On July 9, 1985, District Court Judge Richard F. Suhrheinrich dismissed Respondent's claim because of the lack of personal

jurisdiction.

The Respondent appealed to the United States Court of Appeals for the Sixth Circuit. On March 31, 1988, a decision was handed down reversing the lower court. The Court, in an opinion written by Justice Ryan, found that the defendants purposefully availed themselves to the privileges of Michigan law. The Court found that Petitioners transacted business in Michigan that gave rise to the complained discrimination. On that basis, the Court of Appeals reversed the District Court's ruling.

REASONS FOR DENYING THE WRIT

THE SIXTH CIRCUIT'S DECISION IS CONSISTENT WITH THE DUE PROCESS PRINCIPLES SET FORTH IN THE DECISIONS OF THIS COURT AND WITH THE RESULTS REACHED BY THE OTHER CIRCUITS.

The Petitioners in this case assert that, because they are non-profit corporations, they should be afforded special due process considerations. In jurisdictional matters, due process is afforded when the defendants have purposefully availed themselves to the laws of the forum state. Hanson v Denuka, 357 U.S. 235, 253 (1958). The Court of Appeals' decision was based on the defendants' substantial contact with Michigan. This was in harmony with past decisions of this Court and other courts.

The decision below is proper for the following reasons:

1. THE FACT THAT PETITIONERS ARE NOT FOR PROFIT PROFESSIONAL CORPORATIONS IS IRRELEVANT.

The Court of Appeals correctly dismissed as unimportant the fact that the Petitioners are not for profit organizations. The Petitioners have failed to show, nor can they show, that this Court has ever made a distinction in jurisdiction matters between for-profit and non-profit corporations.

This Court, in International Shoe Co. v Washington, 326 U.S. 310, 319 (1945), pointed out that the key factor is the "quality and nature" of the activities within a state.

> "But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to suit brought to enforce them can, in most instances, hardly be said to

be undue."
(emphasis added) Id. at 319.

Thus, it is the nature of the activities and not the organizational structure of the defendants which controls. There is no reason or justification for carving out a special due process protection for this type of organization. Petitioners have not pointed to any authority which has demonstrated conflict in the courts with respect to due process guidelines based on profit and non-profit status.

2. THE PETITIONERS' ACTIVITIES WERE PURPOSEFULLY DIRECTED AT THE RESPONDENT.

This Court has stated that the vital element in a jurisdiction problem is whether the defendants have purposefully directed their activities toward residents of another state. Burger King v Rudzewicz, 471 U.S. 462, 472, 473 (1985). Here, the Petitioners have conducted activities continuously and

systematically in Michigan for many years. Dues are collected from no less than 77 Michigan members (compiled from the 1983 roster). (Ct. App Appendix p. 150-151). Solicitations and mailings are routinely sent out to members in Michigan. Application fees, convention fees and other payments for seminars and the like are received from members in Michigan (App. 11A).

The Petitioners responded to Respondent's request for an application by mailing an application to let her in Michigan. The Petitioners' correspondence with Respondent in Michigan included notification that her studies had been approved, that she had passed the written examination, and that she had not passed the oral examination. She was also invited to retake the oral examination and pay another examination fee for certification. Phone calls were exchanged between Petitioners in Chicago

and Respondent in Michigan (App. 7A). As Judge Ryan pointed out, the contacts between the parties looked to a "contractual arrangement". The contacts were for the purpose of establishing a professional business relationship (App. 7A).

After the initial contact by Respondent, the relationship became one of bilateral activity. Which party solicited the activity has been held irrelevant, so long as the Petitioners then directed its activities to the resident of the forum. Southern Machine Co. v Molasco Industries, Inc., 4d F.2d 374, 382 (6th Cir 1968).

This Court has held that a single contact may give rise to jurisdiction. McGee v International Life Insurance, 471 U.S. at 475. The business contacts in the case at hand far exceed the minimum "any or slightest" standards set

forth by the lower courts. (App. 6A, 7A).

3. THE CASES RELIED ON BY RESPONDENTS TO SUPPORT THEIR PETITION ARE DISTINGUISHABLE AND ARE NOT CONTROLLING.

The Petitioners rely on the case of Burstein v State Bar of California, 693 F.2d 511 (5th Cir, 1982). Burstein is distinguishable from the case at hand. In Burstein, plaintiff, a Louisiana resident, was seeking to practice law in the State of California and not in the State of Louisiana. The Louisiana Court saw no interest in exercising jurisdiction over the California Bar as it related to professional conduct to be carried out in California. Burstein, 693 F.2d 522. On the contrary, in the case at bar, Respondent was seeking to practice her profession in the forum state. The State of Michigan has an interest in seeing that its endodontists are certified. (App. 21A). The State

clearly has an interest in litigation involving an alleged discriminatory denial of certification of a Michigan professional, who intends to practice in this State.

This Court has stated that "jurisdiction is proper however, where the contacts proximately result from actions by the defendant himself that create a substantial connection with the forum state". Burger King v Rudzewicz, 471 U.S. 462, 475 (1985). If, as Respondent claims, Petitioners rejected her as a result of her being a woman, then it was done, at least partly upon the information Petitioners learned about her from their professional contacts with her in Michigan. (App. 13A).

In this case, the Court of Appeals found the business transacted was threefold. 1. Respondent sought to gain and utilize for professional

advancement Petitioners' board certification in Michigan. 2. Petitioners sought to acquire a Michigan resident's fees; 3. as well as to "[contribute] to the advancement of . . . endodontics by elevating the standards of endodontic practice . . . through certification of candidates in that specialty" by expanding the number of its Michigan diplomates. As a result of this, both parties would extend their influence and professional standing in Michigan (App. 17A). These functions were found by the Court of Appeals to be of a continuous and systematic nature, thereby satsifying all due process and requirements. Burger King, 471 U.S. at 475-476.

The Court of Appeals relied on Hahn v Vermont Law School, 698 F.2d 48 (1st Cir 1983), an action was brought by a former law student in Massachusetts against a Vermont law school, on the theory that

the school had breached its contract with the plaintiff by hiring a professor, without supervision resulting in the plaintiff receiving a failing grade. The Vermont law school was found to have "transacted business" within Massachusetts by mailing application information to the Massachusetts plaintiff in Massachusetts, and then mailing to the plaintiff an offer of admission to him which ultimately resulted in the contract that he claimed was breached. Hahn, 698 F.2d at 51, (Appendix 11a-12a).

The Hahn case reaffirms the principle that the mailing of letters constitutes sufficient business activity to create jurisdiction. Also see Nova Biomedical Corp. v Mollet, 629 F.2d 190, 195 (1st Cir 1980).

The courts have also held that phone calls are sufficient to exercise personal jurisdiction over a non-

resident corporate defendant. In Continental American Corp. v Camera Controls Corp., 692 F.2d 1309, 1314 (10th Cir 1982), the court held that basing jurisdiction on such phone calls would not offend due process principles. See also PeliBares, Inc., v P & C Food Markets, Inc. 567 F.2d 933, 937 (10th Cir 1977). Burrett v Life Insurance Co. of the Southwest, 623 F Supp. 946, 950 (D. Utah 1985).

The Petitioners cite several cases that state phone calls and mailings do not constitute business transactions. Those cases are distinguishable from the one at hand.

In Smith v Piper Aircraft Corp., 425 F.2d 823 (5th Cir 1970), plaintiff sent a letter seeking to sell his product to the defendant, followed by defendant's letter of rejection. This was not enough "business" for jurisdictional purposes. Smith, 425, F.2d at 825.

That is not the case here. Business was transacted in the following manners: fees were accepted, applications exchanged, materials reviewed, examination results provided, correspondence and telphone call were exchanged. The distinction is clear.

In Rambo v American Southern Ins. Co., 839 F.2d 1415 (1st Cir, 1988), the plaintiffs were Oklahoma residents who brought an action against a Georgia insurer in Oklahoma, its claims investigator (a Georgia corporation) and a repair company (a Texas corporation). Plaintiffs made phone calls and mailings to each and asserted jurisdiction based on those contacts. The court dismissed the suit for lack of jurisdiction; it found that the repair company in Texas had no contact with plaintiff until they reclaimed their truck. The insurer (in Georgia) and their investigator (also in Georgia) had not solicited business in

the forum state, nor had they conducted business there. The Court noted in making this decision the fact that plaintiffs were residents of Alabama at the time the insurance contract was actually executed. Rambo, 839 F.2d at 1418, 1420. In analyzing the contacts for purposes of establishing jurisdiction, the Court stated:

> "The proper focus for analyzing these contacts is whether they represent an effort by the defendant to 'purposefully avail itself of the privilege of conducting activities within the forum state."

Id at 1419 (footnote omitted)

Here, the Petitioners fully meet the standard and their reliance on Rambo is unsupportive of their position. The Petitioners have in the past and continue today to conduct business in Michigan. (Appendix 14A). This is evidenced by the numerous board certified members in Michigan. There

are ongoing contacts in the form of mailings, solicitations, collecting and processing of fees.

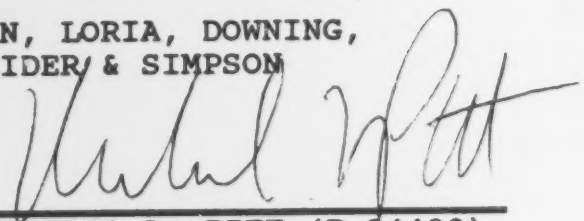
Petitioners are nationwide organizations which depend upon have members in every state. They have purposefully availed themselves of the opportunity to gain and certify endodontists in the State of Michigan. (Appendix 8a). In the past, dentists and residents of Michigan have relied upon the Petitioners to supply references for specialists in endodontics (Appendix 20A). It is apparent that the Petitioners' contacts with Respondent were not an isolated occurrence. These contacts were a result of Petitioners' systematic attempts to extend their influence in Michigan and as a result establish their presence here.

CONCLUSION

Petitioners have failed to establish the requisite showing before this Court to warrant a grant of Certiorari. Respondent Joan Elena Lanier respectfully requests this Court to deny a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment entered in this cause.

Respectfully submitted,

KELMAN, LORIA, DOWNING,
SCHNEIDER & SIMPSON

By: 

MICHAEL L. PITT (P 24429)
Attorney for Respondent
2300 First National Bldg.
Detroit, MI 48226
(313) 961-7363

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